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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 474

WINSTON M. REYNOLDS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER TO THE GOVERNMENT'S BRIEF IN OPPOSITION.

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ARGUMENT.

We conform our reply brief to the order and arrangement of the Government's brief in opposition, designating its pages and paragraphs.

PARAGRAPH 1, (PAGE 12).

QUESTIONS WERE RAISED IN THE COURT OF APPEALS.

The assertion that petitioner's principal challenge, in this Court, is directed to the trial court's oral charge to the jury is correct; but that challenge is not limited to

"portions" of the charge. Petitioner takes the position that the trial court's oral charge to the jury, in its entirety and as a whole, is not merely equivocal but is infused with such plain errors and defects prejudicing petitioner's substantial rights that it shockingly violates the procedure and standards appropriate for criminal trial in the federal courts. See *Rule 52 (b), Federal Rules of Criminal Procedure; Bollenbach v. United States,* 326 U. S. at 607, 613 * * * 614.

In this connection we call the court's attention to Questions Presented for Review Nos. 3, 4 and 5, (Pet. 4 and 5).

The statement that petitioner, "failed again to challenge them (the instructions) in his appeal to the Court of Appeals" is not correct. On Application for Rehearing the instructions were challenged in the United States Court of Appeals for the Fifth Circuit upon all the grounds urged here, although in a different order. (See petitioner's Application for Rehearing filed in this Court on October 20th, 1955 as a part of the certified record.) Hence, the questions are certainly not raised here for the first time.

We explained to the Court of Appeals: "We present first a plain series of errors affecting the substantial rights of appellant which escaped the notice of counsel on trial and on appeal and escaped the notice of this Court in the rendition of its decision. These grounds are presented in the interest of justice under Rule 52 (b), Federal Rules of Criminal Procedure." (See Page 2 of Application for Rehearing.)

PARAGRAPH 1 (A), (PAGE 13).

QUESTIONS 1 AND 2 OF THE PETITION.

In reply to petitioner's arguments in support of Questions 1 and 2 presented for review the Government cites only *Boyd v. United States,* 271 U. S. 104, 107. That case does not touch the questions before this Court. The instruction complained of in that case was merely ambiguous and "was to be taken with what preceded it and also with what followed." This is the timeworn method of resolving an ambiguity.

The objectionable features of the oral charge set up in Questions 1 and 2 ended the trial judge's declaration of the basic question for decision by the jury. Bearing in mind petitioner said, "I am responsible for all this," (R. 185), the statement, "If this evidence shows that he was, in fact, engaged in a lottery for profit, then your verdict in this case will have to be that of guilty," (R. 714), the instruction directs a verdict on a false issue. Petitioner in making that statement to State Officers was not talking about a Federal tax matter. Responsibility for violation of the State lottery law is very different from wilful evasion of the Federal gambling tax laws.

In giving the instructions set up in Questions 1 and 2, the trial judge was not ambiguous nor "cursorily" accurate; "he was simply wrong." *Bollenbach v. United States, supra.*

Government counsel make no mention of *Morris v. United States,* 156 F(2d) 525, in which, at Page 527, this language is to be found:

> "The jury * * * were told that if they found certain enumerated facts, the verdict must be one of guilt; otherwise the verdict must be one of not guilty. A jury's duty cannot be so limited by a judge."

The right of the accused in all criminal prosecutions to a trial by an impartial jury guaranteed by the Sixth Amendment to the United States Constitution must be protected not only from encroachment by military tribunals, but from curtailment or usurpation by the judiciary. The considerations which prompt protection in the former case apply with equal weight to the latter.

We suspect the spirit responsible for the Sixth Amendment is reflected in Rule 52 (b) of the Federal Rules of Criminal Procedure. It is exemplified in the language of the late Chief Justice Vinson when he was on the United States Court of Appeals for the District of Columbia:

> "* * * It is our custom, however, in cases of serious criminal offenses, to check carefully the record for error prejudicial to defendant which he did not urge. * * *" *Williams v. United States,* 131 F(2d) 21 at 22.

See also *United States v. Pincourt,* 159 F(2d) 917.

The Government, attempting to defend the trial judge's oral charge, contends that the instructions must be considered in context and as an entirety. Counsel then quote at Pages 13 and 14, an isolated part of the instructions which is at variance with the portions attacked by peti-

tioner. Considering this isolated part in context, the instruction on the preceding page of the Record reads:

> "The question you have to decide is whether the defendant, Winston Reynolds, was, for the period alleged, actually engaged in conducting a lottery for profit and that he directed the same from his office or residence in Leon County, Florida." (R. 712.)

The instructions are demonstrably in hopeless and irreconcilable conflict. No rational mind could avoid a state of confusion.

Obviously, the trial judge was himself concerned with the lucidity of his instructions to the jury and was fearful that they might be confused when he said,

> "I trust that I have aided you instead of confusing your mind as to the problems you have to consider." (R. 714.)

The mind of the jury, so hopelessly confused, at last was given final and complete direction by the mandatory words:

> "If this evidence shows that he was in fact, engaged in the operation of a lottery for profit, then your verdict in this case will have to be that of guilty. If the government has failed to show that then the defendant is entitled, at your hands, to a verdict of not guilty." (R. 714.)

PARAGRAPH 1 (B), (PAGES 14 AND 15).

QUESTIONS 3 AND 4 OF PETITION.

In an effort to meet petitioner's challenge contained in Questions 3 and 4 of the petition, the Government relies upon *McElvey v. United States,* 260 U. S. 353, 356-357, and *Edwards v. United States,* 312 U. S. 473, 482-483. Those cases are not in point.

The statute involved in this prosecution (Section 3285, Title 26, U.S.C.) differs greatly from those considered by the court in the *McElvey* and *Edwards* cases. In the latter cases the court held that it was not necessary that the prosecution negative exceptions contained in a statute in either the charge or the proof. In the instant statute we are not concerned with "exceptions". Here, the statute is definitive; it contains no provisos or exceptions. The statute states:

> "(a) Wagers:—There shall be imposed on wagers, *as defined in subsection (b)* * * *" (Emphasis supplied) (Pet. Appendix B, p. 52).

The Government completely ignores *Hale v. United States,* 89 F(2d) 578, cited by petitioner. The rule enunciated in that case controls the question raised by petitioner. Here, as in the statute considered in Hale, the "exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the acts, omission, or other ingredients which constitute the offense. Such an offense must be accurately and clearly described, and if the exception is so in-

corporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading * * *."

The tax statute plainly and clearly applies only to those particular lotteries for profit which are specifically defined therein. It was not, therefore, incumbent upon petitioner to establish in the proof that his was a lottery to which the provisions of the Wagering Tax Statute were not applicable.

PARAGRAPH 1 (C), (PAGES 15 AND 16).

QUESTION 9 OF THE PETITION.

The Government attempts to answer our contention that the failure of the trial judge to instruct the jury concerning the lesser offense described in 26 U.S.C. 2707 (b) is necessarily included in the felony offense set forth in 26 U.S.C. 2707 (c) is prejudicial error, with the argument that petitioner is in no position to complain of the trial court's failure to give an instruction which petitioner did not seek. The Government relies on *Himmelfarb v. United States*, 175 F(2d) 924, 944. The decision in that case is based upon the fact that the court did "not find that the evidence warranted the giving of such other instructions where none were requested. The court was justified in not giving an instruction on the lesser offense from the facts herein."

In the instant case the Government relied upon circumstantial evidence to show a wilful evasion. The jury might very well believe that the circumstantial evidence was insufficent to prove wilful evasion and at the same time believe that evidence in the case did prove wilful

omission or neglect to account for and pay. Hence, under the facts in the instant case, Rule 31 (c) of the Federal Rules of Criminal Procedure required the trial judge to instruct the jury on the lesser offense.

PARAGRAPH 1 (D), (PAGES 16 AND 17).

QUESTION 5 OF THE PETITION.

The Government's appraisal of petitioner's Question No. 5 and his supporting argument does not seem to us to be complete and accurate. We argued that the trial court failed to instruct the jury of the legal necessity for the commission of an affirmative act and the nature of such act necessary to support a conviction of evasion of the tax. The question adds the contention that the instruction quoted therein was a directly opposite statement of the law.

In *Clay v. United States*, 218 F(2d) 483, 484, it is said:

> "* * * The government concedes, as it must, that allegation *and proof* of liability for the occupational tax coupled with a failure to pay it, is not sufficient to constitute a felony violation, *but, in addition, there must be some affirmative act on the part of the defendant showing an attempt to evade the imposition of the tax.*" (Emphasis supplied.)

The Government seeks to escape the force of this holding in the *Clay* case by quoting the judge's instruction that proof of the offense charged required a showing of "intent to evade and defeat the tax and some act or acts done in furtherance of such intent." Nowhere in the entire charge is it even casually stated that wilful nonpayment or neglect to pay the tax is not enough, but in

addition, "some affirmative act" disclosing an intent to defeat the tax is a prerequisite to the conviction of the felony.

See *Spies v. United States*, 317 U. S. 492, where it is said that the felony statute "was not violated by wilful omissions to make a return and to pay the tax."

The trial judge's summary to the effect that the presumption is that a person intends to defeat the tax when he intentionally fails to register or pay the tax not only did not fairly or accurately state law, but took away from the jury the misdemeanor aspects of the case and amounted to an instruction that mere wilful non-payment of the tax was enough to warrant petitioner's conviction.

PARAGRAPH 2, (PAGES 17 TO 19).

QUESTION 8 OF THE PETITION.

Since the Government apparently concedes that something more than mere non-payment of the tax must be *proved* in order to sustain a conviction of a wilful attempt to evade or defeat such tax, as indeed it must according to the *Clay* and *Spies* cases, *supra*, the prosecution should be required to plead allegata to which the probata must conform. The settled law developed by prosecutions under *26 U. S. C. 2707* draws clear-cut and well defined distinction between the felony and the misdemeanor. Logic and reason, it seems to us, therefore demand that since non-payment of the tax would constitute the misdemeanor, affirmative acts which, as a matter of law, would raise the offense to the statute of a wilful attempt to evade and defeat the tax, the felony,

are the essence of the distinction between the two crimes and, therefore, should be alleged and proved as laid.

PARAGRAPH 3, (PAGE 19).

QUESTION 6 OF THE PETITION.

In answer to the contention that petitioner was entitled to a directed verdict of acquittal, the brief in opposition argues there were elaborate means of concealment from which the jury could properly infer a wilful attempt at evasion. The Court of Appeals did not find there were elaborate efforts to evade the tax. The existence of numerous telephone lines was not an act of concealment. The adding machines were not concealed. If the secret compartment contained records, the proper inference from the evidence is that the slamming noise heard by the officers was the act of Mrs. Lambert, who was upstairs. (R. 129-130.)

Assuming that the evidence in this record discloses the existence of a lottery operation in Florida, it shows nothing more than the to be expected efforts to prevent detection of its existence by State law enforcement authorities.

A fair appraisal of the evidence shows not one single fact or circumstance tending to prove that petitioner did anything beyond mere failure to register and pay taxes under the Federal Wagering Tax laws.

The hypothesis of concealment of a lottery operation to avoid State prosecution is obviously consistent with mere wilful failure to pay any actual applicable Federal tax on such lottery operation and, for the purpose of this prosecution, such a hypothesis is entirely consistent with

innocence of the crime of wilfully attempting to evade or defeat the Federal tax.

PARAGRAPH 4, (PAGES 19-20).

QUESTION 7 OF THE PETITION.

This question challenges the jurisdiction of the court over Counts 5 and 6. The answer of the Government to our contention sets up 26 CFR 1955 Supplement, Section 325.30. The short answer to the Government is that petitioner was not indicted for violation of the regulations. He was indicted for failure to account for and pay over the taxes. This failure could only take place in Jacksonville, since he could not account for and pay over at any other place. A failure to keep records in one place is not an act of omission in a different place.

PARAGRAPH 5, (PAGE 20).

QUESTIONS 11 AND 12 OF THE PETITION.

When we wrote our petition we were not familiar with the case of *Lewis v. United States,* 348 U. S. 419. The addition of the Lewis decision to the Kahriger decision makes it apparent that we asked too much in asking this court to change its holding as to constitutionality.

The income tax cases cited by the Government which hold that illegality of a source of income is not an excuse for failure to pay the tax seems to us to justify the position of the Government that our argument that the excise tax is unconstitutional, is unsound.

CONCLUSION.

The issue in this case is not, as the Government urges, "whether petitioner was the person who had the duty to pay the taxes." (P. 14). The issue in the trial court were those of wilful attempts at evasion and wilful failure to account for and pay over.

The primary issue in this court is whether the right of trial by jury guaranteed by the Sixth Amendment to the United States Constitution, which has been extended to murderers, rapists and traitors, is to be denied to a gambler. The primary concern of this court is not whether petitioner is a nice person or a law-violator, but whether or not he has been tried for a federal offense in accordance with the accepted principles of federal law and the Constitutional guaranties.

Respectfully submitted,

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I hereby certify that I have served three (3) copies of the foregoing Reply Brief of Petitioner to the Government's Brief in Opposition upon the Solicitor General by mailing them, United States air-mail, postage prepaid, to him at his address, Department of Justice, Washington 25, D. C.

This .... day of November, 1955.

.....

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I further certify that I have also mailed by United States air-mail, postage prepaid a copy of the foregoing Reply Brief of Petitioner to the Government's Brief in Opposition to Honorable Harrold Carswell, United States Attorney, Northern District of Florida, Tallahassee, Florida, and a copy to the Honorable Hayford O. Enwall, Assistant United States Attorney, Tallahassee, Florida, on this the .... day of November, 1955.

.....

Attorney for Petitioner.